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THE MARITIME LIEN.

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"Action in *rem.*" as used in the admiralty law is not a scientific phrase in the sense used by standard writers on jurisprudence. Holland calls a right in *rem.* "a right available against all the world ; or a right of indeterminate incidence." In admiralty, the respondent is treated as the offending thing ; but the action is really to recover damages against the owner of the thing for an injury caused either by his own wrong or that of his agents. Therefore while the form of the action is in *rem.*, analyzed by the principles of jurisprudence, it is an action in *personam*. Indeed, Mr. Holland has pointed this out in his work (page 226):

"Certain rights enforceable in courts of admiralty which are doubtless capable of being represented as remedial rights in *rem.* may also be treated as being merely modes of execution by which true remedial rights are made effective."

This mode of execution is a necessary means of obtaining justice in ports where the owner or contractor is not present or where he has no property except the "thing." It is similar to the jurisdiction of common law courts obtained by attachment of an absent defendant's property. One mode of proceeding is just as truly an action in *rem.* as the other. The latter of course differs in giving a right to collect the balance of the judgment over and above the value of the property attached within the State where the action is instituted ; while in admiralty an election is necessary whether to sue in *rem.* or in *personam*.

An action in *rem.* is distinguished by the fact that the vessel or thing proceeded against is itself seized and impleaded as the defendant and is judged and sentenced accordingly.¹ Its seizure and advertisement of the same is notice to all the world to come in and defend in behalf of the inanimate object. It has not the right of a jury trial and if condemned it passes by judicial sale to

¹ The *Moses Taylor*, 4 Wall. 413.

a purchaser free from all claims. Herein does the admiralty proceeding differ from attachment of an absent defendant's property. Upon execution sale, the title of the personal defendant is alone sold ; in admiralty—the thing itself—to vest absolutely in the vendee of the marshal and to proceed untrammelled again on its beneficent or injurious career.

Admiralty lawyers have spent much time and learning in attempting a proper definition of a maritime lien. Sea laws of all ages have been threshed thoroughly ; but of all definitions, Judge Curtis' seems to me the best :

"A real and vested interest in the thing, constituting an incumbrance placed thereon by operation of law, to be executed by judicial process against the thing to which no party is made a party save by his voluntary intervention and claim." ²

This sums it up fairly well: an interest, not a mere privilege, although there are many cases in the books decided on that theory. It attaches to the thing itself, and to every part and all the proceeds thereof, not by agreement of the parties, but by law, and therefore the law must step in to enforce the lien.

A much travelled bag or trunk comes back from an extended journey with its owner covered with pasters of express companies, of steamboat lines, of various inns and hotels. Sometimes apparently the artist has found no place to put his sign but overlapping another of earlier date. These pasters can be removed with some effort, but they will wear off with time however. The paster and the bag are fairly good illustrations of the maritime lien and the ship. Of course the connection cannot be pushed to any length ; yet, like the pasters, the liens are firmly attached, and sadly often they become so numerous as to cover each other, and the earlier cannot be taken care of until the later have been removed.

But if lawyers have been puzzled to define a maritime lien, they have been equally at a loss when compelled to state its object—to what the lien can attach. It was simple fifty years ago to say "a ship or vessel." But to say nothing of the havoc wrought in admiralty law by the decision of the General Smith, 4 Wheaton 438, and the following cases, by the Supreme Court of the United States, modern inventions and the exigencies of modern life have woefully taxed the discriminations of the admiralty lawyer—and the true representative of that branch of the profession was never remarkable in his acquisition of novel notions either of practice or principles. The wonder is not that judges and lawyers

² The Young Mechanic, 2 Curtis 404, 413.

have been so contradictory in their rulings, but so consistent on the whole. Canal-boats and barges were first admitted to the list of lien-carriers. The *D. C. Salisbury*, Olc. 71; The *General Cass*, 1 Browne 334; *Endner v. Greco*, 3 Fed. Rep. 411; *Ex parte Easton*, 95 U. S. 68. It will be remembered that canal-boats cannot be libelled for wages;³ but if they are not engaged in navigating canals, they are not canal-boats.⁴

In the *Rock Island Bridge* (1869) Mr. Justice Field said:

"A maritime lien can only exist upon moveable things which are the subject of commerce upon the high seas or navigable waters."

He puts the test "moveable things engaged in navigation." Mr. Justice Bradley practically uses the phrase "navigable structure" in *Cope v. Vallette Dry Dock Company*, 119 U. S. 625-629. So a pile driver, a steam dredge, a steam derrick and a floating elevator have all been rightly declared objects of a maritime lien; although this class of floating machines uses navigation only collaterally in aid of its other functions.⁵ In the Eastern District of New York, a covered scow used as a boat-house, has been held to be capable of carrying a maritime lien. The statute gave the lien for wharfage against a "floating structure;" but the decision did not turn upon the statute.⁶ The ruling cannot be sound. A boat-house, like that under discussion, floats but does not navigate. The New York statute could have nothing to do with the case; for, however the State courts might construe the law (see *Pendleton v. Franklin*, 7 N. Y. 508), a State statute cannot convert a structure into a maritime lien-carrier by its mere declaration any more than it can make a contract maritime which has by nature no maritime features.⁷ Bridges, wharves and dry-docks are not objects of the lien clearly; but conflicting decisions have been rendered in reference to the status of rafts. It has been held that they are objects of salvage.⁸

³ U. S. R. S., Sec. 4251.

⁴ *Smith v. Canal-boat William L. Norman*, 49 Fed. Rep. 285.

⁵ *The Alabama*, 22 Fed. Rep. 449; *The Pioneer*, 30 Fed. Rep. 206; *Kearney v. A Pile Driver*, 3 Fed. Rep. 246; *Aitcheson v. Endless Chain Bridge*, 40 Fed. Rep. 256; *Maltby v. A Steam Derrick*, 3 Hughes 477; *Coasting Co. v. The Commodore*, 40 Fed. Rep. 258; *The Hezekiah Baldwin*, 8 Ben. 556.

⁶ *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269.

⁷ *The Pacific*, 9 Fed. Rep. 120; *Roach v. Chapman*, 22 How. 129; *The Guiding Star*, 18 Fed. Rep. 263.

⁸ *A Raft of Spars*, 1 Abb. Ad. 485; *50,000 Feet of Lumber*, 2 Low. 64; *Muntz v. A Raft*, 15 Fed. Rep. 557; *A Raft of Cypress Logs*, 1 Flippin 543.

Mr. Justice Taney decided differently in *Tome v. 4 Cribs of Lumber*, Taney Dec. 533 (see *Palmer v. Rouse*, 3 Hurl & Nor. 505). It is suggested in the opinion of *Muntz v. A Raft* (*supra*) that there may be a distinction between salvage and other liens; but I cannot see it unless we accept the theory of Story that there is a salvage lien for goods derelict on land; a discussion of the latter subject is given below.⁹ We cannot sustain the lien upon the analogy of flotsam, jetsam, etc., or even of a dead whale, for salvage may be predicated of them because they partake of the nature of the ship to which they once belonged. The following cases are libels in *personam* for conversion: *In re Whale*, 2 Hagg. Adm. 438; *Ghen. v. Rich*, 8 Fed. Rep. 159-162; *Taber v. Jenny*, 1 Spr. 315; *Bartlett v. Budd*, 1 Low. 223; *Swift v. Gifford*, 2 Low. 110.

A raft is certainly a floating structure used in navigation, although it may be broken up at the conclusion of the voyage. It is the simplest form of a navigating machine. That it has no motive power of its own can, under the decisions, be no objection. Neither are the decisions in reference to possessory actions controlling because the rule refers only to ships.¹⁰ The case of *Jones v. Coal Barges*, 3 Wall. Jr. 53, it seems to me, was wrongly decided.

But he can sue the owner for a recompense for his trouble and disbursements in securing the lost articles.¹¹ But if the vessel or floating structure belongs to the government a lien cannot be implied against it; even where a municipality is the owner, it is exempt, for a municipality is simply a local branch of the sovereign State.¹² While a maritime lien can attach only to a floating structure used in navigation, that is, in the carriage of persons and property on navigable water; not every service to, contract concerning,

⁹ In his work on "Bailments," Judge Story has strongly contended for a lien on property saved on land similar to a salvage lien. The lien must be possessory and not maritime. But the weight of authority is decidedly to the effect that no lien can be implied in favor of the finder. Story on Bailments, Sec. 121 a; *Binstead v. Buck*, 2 Wm. Bl. 1117; *Nicholson v. Chapman*, 2 H. Bl. 254; *Baker v. Hoag*, 7 N. Y. 555-560; *Wentworth v. Day*, 3 Met. 352.

¹⁰ Adm. Rule 20, *Gastrel v. A Cypress Raft*, 2 Woods, 213.

¹¹ Doctor and Student Ch. 51; *Nicholson v. Chapman*, 2 H. Bl. 254; 2 Kent (6th Ed.) 355; Story on Bailments, Sec. 121 a; *Jones on Liens*, Sec. 485; *Reeder v. Anderson's Adm'rs*, 4 Dana (Ky.) 193; *Amory v. Flynn*, 10 John 102; *Preston v. Neale*, 12 Gray 222; *Chase v. Corcoran*, 106 Mass. 286; *Sheldon v. Sherman*, 42 N. Y. 484-487; *Woods v. Pierson*, 45 Mich. 313; *De La O. v. Acoma*, 1 New Mex. 226; *Watts v. Ward*, 1 Ore. 86.

¹² *The Fidelity*, 16 Blatch. 596; *Klein v. New Orleans*, 99 U. S. 149.

or wrong done by that structure gives a maritime lien against it. The service or contract may be maritime and no lien follow. This must be carefully understood at the outset; otherwise the student of admiralty law will be misled by the loose expressions of many able judges and become totally helpless in the well nigh inextricable tangle of conflicting authorities.

The lien can be expressed by the parties; can be implied by admiralty law from the transactions or given by State statute. Yet in each case the lien does not attach unless the contract is maritime. Parties can create a lien when the contract is maritime; general law implies one in certain forms of maritime contract and State statutes which give liens can give them only when the contract is maritime. A few examples will make this clear:

An owner mortgages his ship for his personal debt; there is no maritime character to the lien. Common law courts can therefore alone give a remedy to the mortgagee against the mortgagor on his contract.¹³ The owner or master pledges her keel by bottomry bond to raise money for the ship's purposes; a lien is immediately created; and the sole remedy on the lien is in admiralty.¹⁴

The owner can, of course, pledge his boat on bottomry at any time and place for his personal debt, but admiralty will not enforce the lien for there is nothing maritime about the transaction. An owner or master without funds in a foreign port procures supplies or causes his vessel to be repaired; a maritime lien attaches to the ship and pending freight. The same thing is done in an home port; no lien is implied; but the contract is maritime, as the Supreme Court held in the famous *General Smith*, while if the State gives a lien against a domestic ship for repairs or supplies, etc., it can be enforced in admiralty under the 12th rule as construed by the Court in the *Lottawanna*, 21 Wall. 551.

If the State gives a lien against a vessel in favor of the builder or the furnisher of materials to build her, it can not be enforced in the Admiralty Court, for the contract is not maritime.¹⁵ But a State can enforce that lien for the same reason, and its tribunals do not trespass upon the constitutional domain of the federal jurisdiction. It is the ordinary foreclosure of a mechanic's lien.

What, therefore, is a maritime contract? In *Insurance Company v. Dunham*, 11 Wall. 1, 31, the Supreme Court vainly

¹³ *Bogart v. The John Jay*, 17 How. 399.

¹⁴ *The Belfast*, 7 Wall. 624-646.

¹⁵ *The Pacific*, 9 Fed. Rep. 120; *The Kingston*, 23 Fed. Rep. 200; *The Guiding Star*, 18 Fed. Rep. 263-268; *The Selt*, 3 Biss. 344.

endeavored to define it ; and finally stated as its conclusions " the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed."

The old British law was that a maritime contract was one made upon the sea and to be performed thereon ;—but this rule was overthrown in *Menetone v. Gibbons*, 3 T. R. 269, where the subject matter was made the test ;—in that case it was held that a controversy concerning a bottomry bond was within the admiralty jurisdiction.

The doctrine that the contract must be executed within the ebb and flow of the tide has long since been abrogated, although it caused much trouble in the earlier questions before the U. S. Supreme Court ; but in a very strong opinion has lately received a re-exhumation and a last reburial.¹⁶

But the fact that there is a remedy at common law does not prevent the character of the contract being maritime. Sailors are the wards of admiralty, but they have common law rights against the ship's owners. A policy of marine insurance is another instance of concurrent jurisdiction.

The subject matter of the contract is therefore the test ; if the contract concerns navigation, and ships as floating structures, it is maritime ; otherwise the contract is one purely of common law jurisdiction.

The contract to build a ship is not maritime. This was early decided. The ship is intended to sail, but until the vessel becomes a floating thing capable of navigation it cannot be subject to admiralty jurisdiction and therefore cannot carry a maritime lien. The matter is analagous to a contract for a marine policy. The contract is maritime when the policy is made, not when an agreement to make a policy is consummated. Likewise the cargo is bound to the vessel after it is laden, but not before. A ship broker who arranges a charter party has no standing in an attempt to collect his commissions ; but the charter when made is a maritime contract, and construed and enforced by the admiralty law. The broker who engages a crew makes no implied maritime contract with the owners for compensation for his services and has no lien against the vessel.¹⁷

Brown, D. J., in *The Thames*, 10 Fed. Rep. 848, has well said :

" The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from

¹⁶ *Ex parte Garnett*, 141 U. S. 1.

¹⁷ *Insurance Company v. Dunham*, 11 Wall. ; *The Thames*, 10 Fed. Rep. 848 ; *The Crystal Stream*, 25 Fed. Rep. 575 ; *Ferris v. Jewett*, 2 Fed. Rep. 112.

the first and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down I do not perceive any other dividing line for excluding from admiralty many other sorts of claims which have a reference more or less remote to navigation and commerce. If the broker of a charter party be admitted, the insurance broker must follow, the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed."

But it has been held that although the contract of shipbuilding is not maritime, yet the contract to furnish supplies or material to a ship not yet built, but being built in a foreign port, is maritime, provided the materials, etc., are ordered in contemplation of a voyage.¹⁸ But the writer doubts whether the distinction — anticipation of marine service — is a good one. A ship is built for no other purpose than a voyage, and such intention must be implied in every case. This decision is opposed to the better doctrine that when supplies and materials are furnished for a vessel not yet built, although in contemplation of the vessel's sailing, the contract is not maritime and no lien results. The cases are numerous and better considered.

There is no difference in the contract to build and the contract to furnish materials for building.¹⁹ The *Manhattan*, 46 F. 797, attempts to recognize both lines of cases by holding that a contract of building gives no lien but that a rebuilding before the ship is completed and ready for commerce is a maritime contract and gives a lien. When Judge Benedict says, in 33 Fed. Rep. 299, "The Supreme Court has yet to hold that contracts to make nets for a contemplated fishing voyage of a fishing vessel are not maritime because made on land, and with reference to a voyage to be performed," he is surely wrong, for in *Edwards v. Elliot*, 21 Wall. 532, 554, Clifford J. said, "Ships are bought and sold in the market just as ship timber, engines, anchors or chronometers are bought and sold, and no reason is perceived why a contract to build a ship any more than a contract for the materials of which a ship is composed or for the instruments or appurtenances to propel or manage the ship, should be regarded as maritime," and fish-nets are surely appurtenances.²⁰

¹⁸ *The Hiram R. Dixon*, 33 Fed. Rep. 297.

¹⁹ *In re Glenmont*, 32 Fed. Rep. 703; *Edwards v. Elliot*, 21 Wall. 532; *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *The Pacific*, 9 Fed. 120; *The Norway*, 3 Ben. 163; *The Count de Lesseps*, 17 Fed. Rep. 460. *Contra*: *the Eliza Ladd*, 3 Sawyer 519; *The Revenue Cutter No. 2*, 4 Sawyer 143.

²⁰ *The Witch Queen*, 3 Sawyer 201.

Under rule 12, promulgated in 1872, a State lien in favor of the ship builder or to a contractor who furnishes materials cannot be enforced by the Admiralty Courts by a proceeding in *rem*.—for the contract is not maritime. This position has been well defended in the Pacific, 9 Fed. Rep. 120, by Judge Hughes, of the district of Virginia.²¹ But the *Calisto*, Dav. 30; *Read v. Hull* of a new ship, 1 Story 244; *Davis v. a new brig*, Gilp. 473; *Merritt v. Sackett*, 12 L. Rep. 515, are against the doctrine. But for the most part these decisions were rendered before *Roach v. Chapman*.

As to whether a stevedore has a maritime lien for lading and unlading a cargo, has been debated back and forth by the Circuit Courts. The majority are in favor of the lien. It depends of course upon the decision of the question whether the service is maritime.

The following are in favor of the lien: *The Williams*, 1 Brown Adm. 225; *The George G. Kemp*, 2 Low. 482; *The Senator*, 21 Fed. Rep. 191; *Roberts v. The Bark Windemere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The Circassian*, 1 Ben. 209; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Sarah E. Kennedy*, 29 Fed. Rep. 264; *Florez v. The Scotia*, 35 Fed. Rep. 916; *The Wyoming*, 36 Fed. Rep. 495; *The Olga*, 32 Fed. Rep. 479; *The Henry Warner*, 29 Fed. Rep. 601, 603; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Velox*, 21 Fed. Rep. 479.

Against the lien are: *The Amstel*, Bl. and H. 215; *The Joseph Cunard*, Olc. 123; *Cox v. Murray*, Abb. Ad. 341; *The S. G. Owens*, 1 Wall. Jr. 370; *The A. R. Dunlap*, 1 Low. 361; *The Bark Ilex*, 2 Woods. 229; *The Esteban de Antunano*, 31 Fed. Rep. 920.

The Augustine Kobbe, 37 Fed. Rep. 696, while deciding that the claim of the stevedore is not maritime, held that it might be enforced in admiralty as a State lien; while in the *Wyoming* (*supra*) it was held that it was maritime, and a lien results against the vessel even in a home port, when the fact appears even expressly or inferentially that the services are rendered on the credit of the vessel.

If stevedores have a lien, it must be by virtue of a maritime contract. They stand in the same position then as material men, and to obtain a lien in a home port, apart from a State statute, the

²¹ *Roach v. Chapman*, 22 How. 129; *The Witch Queen*, 3 Sawyer 201, 206; *The J. C. Rich*, 46 F. 136; *The Dundee*, 1 Hagg. Adm. 109; *The Kingston*, 23 F. 200; *Scull v. Shakespeare*, 75 Penn. St. 297; *Young v. The Orpheus*, 2 Cliff. 29.

hypothecation in their favor must be express. But the finding in the "Kobbe" (*supra*) is an example of the misunderstanding prevalent even among learned lawyers concerning the distinction between maritime contracts and maritime liens. Admiralty has jurisdiction of stevedores' claims, or it has not. If it has, it must be only when the vessel is in a foreign port, unless a special contract is made. If the vessel is domestic, the next question is whether the statute of the State gives a lien and whether it has been complied with.

MARITIME TORTS. LOCALITY OF ACT THE TEST OF ADMIRALTY JURISDICTION.

However much admiralty jurisdiction in matters of contract has been controverted, in matters of tort the courts have laid down a plain rule and easily applied. It is as follows :

"There can be no jurisdiction in the admiralty unless the substantial cause of action arising out of the wrong is complete upon navigable waters."

It was applied in the case of a fire communicating from a vessel in navigable waters to a wharf and ware-house thereon;²² to a collision with a dock;²³ with a swing bridge;²⁴ to a collision between a ship and a derrick, which with its tackle was being used in the building of a pier for a light house in Long Island Sound;²⁵ to damage a marine railway from a ship's dragging her anchor across its ground ways;²⁶ to the case of a steamboat negligently running against an oil depot on the levee of the Mississippi river when by reason of flood it was surrounded by navigable water.²⁷ A case, *The Mary Stewart*, 10 Fed. Rep. 137, is put upon this ground by Hughes J. where a stevedore not in the direct employ of the ship, but working under the employ of a contractor was injured by the fall of a bale of cotton on him while he was upon the wharf. The rope used in the lading of the cotton belonged to the ship, and broke under the weight of the cotton, whence the damage to the libellant.

²² *The Plymouth*, 3 Wall. 20, *in re* Insurance Co., 118 U. S. 610.

²³ *The Ottawa*, 1 Brown 356 ; *C. Accame*, 20 Fed. Rep. 642.

²⁴ *Neil Cochran*, 1 Brown, 162 ; *City of Milwaukee v. The Curtis*, 37 Fed. Rep. 705 ; *City of Boston v. Crowley*, 38 Fed. Rep. 202.

²⁵ *Maude Webster*, 8 Ben. 547.

²⁶ *The Professor Morse*, 23 Fed. Rep. 803.

²⁷ *The Arkansas*, 17 Fed. Rep. 383.

Extreme cases have been put upon this ground, a tort to a boom which floated but with one end attached to the shore.²⁸ The decision of the *Mary Stewart* (*supra*) is right on the principle of the locality of the tort, not on the principle of master and servant. If the stevedore was rightfully on the wharf, in the service of the ship, the ship was under a duty not to injure him. This duty was matter inducement in pleading the tort. The stevedore had a remedy at common law which a stranger or trespasser would not have.

Can this principle of locality of the tort be carried so far as to apply to the injury of a sailor on the wharf by reason of its negligence while he is engaged in the service of the ship? It seems unreasonable to permit a sailor to sue in admiralty when he is standing on the deck or working in the hold when injured, the admiralty giving him a lien upon the ship, and to refuse him that privilege when he happens to be upon the wharf in the ship's service.

An instance of the narrow line separating the two jurisdictions appears in *New York v. Highland*, 6 Ben. 289, when an exception to the libel for not stating a cause of admiralty jurisdiction was overruled, as it did not appear that the pier injured was on the land. It might have been a floating structure.

It must be constantly remembered, however, that though a tort be maritime no lien follows where there is nothing to which the lien can attach, viz: a floating structure engaged in navigation.²⁹

I have stated some elementary principles of a maritime lien. To discuss the various maritime contracts which give a lien would take a volume. It is but fair to say, however elementary the foregoing observations may be, that admiralty books give but a hazy conception of the distinctions which I have attempted to thus briefly set forth.

²⁸ *City of Erie v. Canfield*, 27 Mich. 479. *Contra*: *The Ceres*, E. D. Pa. 7 Weekly Note Cases 576.

²⁹ *Atlee v. Packett Co.*, 21 Wall 389; *The Rock Island Bridge*, 6 Wall. 213; *R. R. Co. v. Tug Boat Co.*, 23 How. 209; *Etheridge v. Philadelphia*, 26 Fed. Rep. 43; *The City of Lincoln*, 25 Fed. Rep. 835; *Leonard v. Decker*, 22 Fed. Rep. 741; *Gerrity v. The Kate Cann*, 2 Fed. Rep. 241; *Todd v. Tulchen*, *id.* 600.